

Hon. _____

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA,
STATE OF WASHINGTON,
PUYALLUP TRIBE OF INDIANS; and
MUCKLESHOOT INDIAN TRIBE,

Plaintiffs,

v.

GLACIER NORTHWEST, INC.

Defendant.

Civil No.

COMPLAINT

Plaintiffs United States of America, by authority of the Attorney General, on behalf of the National Oceanic and Atmospheric Administration of the Department of Commerce and the Department of the Interior; State of Washington through the Washington Department of Ecology; Puyallup Tribe of Indians; and Muckleshoot Indian Tribe, allege as follows:

COMPLAINT - 1

U.S. Department of Justice
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1 I. GENERAL ALLEGATIONS

2 1. This is a civil action under section 107(a) of the Comprehensive Environmental
3 Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9607(a); section 311 of the
4 Clean Water Act (CWA), 33 U.S.C. § 1321; section 1002(b) of the Oil Pollution Act (OPA), 33
5 U.S.C. § 2702(b); and the Model Toxics Control Act (MTCA), RCW 70.105D, for damages for
6 injury to, destruction of, or loss of natural resources resulting from the release of hazardous
7 substances and discharges of oil into Commencement Bay in Tacoma, Washington.

8 II. JURISDICTION AND VENUE

9 2. This Court has jurisdiction over this case pursuant to sections 107 and 113(b) of
10 CERCLA, 42 U.S.C. §§ 9607 and 9613(b); section 311(n) of the CWA, 33 U.S.C. § 1321(n);
11 section 1017(b) of OPA, 33 U.S.C. § 2717(b); and 28 U.S.C. §§ 1331, 1345 and 1367(a).

12 3. Venue is proper in this district pursuant to section 113(b) of CERCLA, 42 U.S.C.
13 § 9613(b); section 1017(b) of OPA, 33 U.S.C. § 2717(b); and 28 U.S.C. § 1391(b) and (c).

14 III. THE SITE

15 4. Commencement Bay is an embayment in southern Puget Sound located in and
16 adjacent to Tacoma, Washington.

17 5. The "Commencement Bay Environment" as used in this Complaint means the
18 waters of Commencement Bay, including the shoreline, intertidal areas, tributaries, drainage
19 areas, estuaries and bottom sediments, lying south of a line drawn from Point Defiance to Dash
20 Point, and including the Thea Foss Waterway, Wheeler-Osgood Waterway, Middle Waterway,
21 St. Paul Waterway, Puyallup River from the mouth south to the present City limits, Milwaukee
22 Waterway, Sitcum Waterway, Blair Waterway and Hylebos Waterway. This area includes but is
23 not limited to the Commencement Bay Nearshore/Tideflats Superfund Site, as identified or
24 amended by the U.S. Environmental Protection Agency, and areas affected by releases of
25 hazardous substances within the Commencement Bay Nearshore/Tideflats Superfund Site.

26 6. Commencement Bay is contaminated with a variety of hazardous substances,
27 including antimony, cadmium, chromium, copper, mercury, nickel, lead, zinc, bis(2-ethylhexyl)-
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1 phthalate, hexachlorobenzene, hexachlorobutadiene, polycyclic aromatic hydrocarbons and
2 polychlorinated biphenyls (PCBs).

3 7. The Hylebos Waterway and Commencement Bay are navigable waters within the
4 meaning of section 1001(21) of OPA, 33 U.S.C. § 2701(21), and section 502(7) of the CWA, 33
5 U.S.C. § 1362(7).

6 IV. PLAINTIFFS

7 8. Pursuant to section 107(f) of CERCLA, 42 U.S.C. § 9607(f), section 1006 of
8 OPA, 33 U.S.C. § 2706, section 311(f)(5) of the CWA, 33 U.S.C. § 1321(f)(5), and 40 C.F.R. §
9 300.600, the United States is trustee for certain natural resources in the Hylebos Waterway and
10 the Commencement Bay Environment.

11 9. Pursuant to section 107(f) of CERCLA, 42 U.S.C. § 9607(f), section 1006 of
12 OPA, 33 U.S.C. § 2706, section 311(f)(5) of the CWA, 33 U.S.C. § 1321(f)(5), 40 C.F.R. §
13 300.605, Ch. 43.21A RCW, Ch. 70.105D RCW, and Ch. 90.48 RCW, the State of Washington is
14 trustee for certain natural resources in the Hylebos Waterway and the Commencement Bay
15 Environment.

16 10. Pursuant to section 107(f) of CERCLA, 42 U.S.C. § 9607(f), section 1006 of
17 OPA, 33 U.S.C. § 2706, and 40 C.F.R. § 300.610, the Puyallup Tribe of Indians is trustee for
18 certain natural resources in the Hylebos Waterway and the Commencement Bay Environment.

19 11. Pursuant to section 107(f) of CERCLA, 42 U.S.C. § 9607(f), section 1006 of
20 OPA, 33 U.S.C. § 2706, and 40 C.F.R. § 300.610, the Muckleshoot Indian Tribe is trustee for
21 certain natural resources in the Hylebos Waterway and the Commencement Bay Environment.

22 V. DEFENDANT

23 12. Defendant Glacier Northwest, Inc. is a corporation organized under the laws of the
24 State of Washington.

25 13. Defendant does business in this district.

26 14. Defendant has owned and operated the Lone Star NW cement batch plant at the
27 head of the Hylebos Waterway since 1987.

1 101(9) of CERCLA, 42 U.S.C. § 9601(9).

2 21. Releases of hazardous substances have occurred in the Commencement Bay
3 Environment within the meaning of sections 101(22) of CERCLA, 42 U.S.C. § 9601(22). The
4 releases of hazardous substances in the Commencement Bay Environment at the facilities
5 operated by Defendant have resulted in injury to, destruction of, or loss of natural resources
6 within the trusteeship of one or more of the Plaintiffs.

7 22. Defendant is a person within the meaning of section 107 of CERCLA, 42 U.S.C. §
8 9607.

9 23. Defendant is liable to Plaintiffs for natural resource damages resulting from
10 releases of hazardous substances pursuant to section 107(a)(4)(C) of CERCLA, 42 U.S.C. §
11 9607(a)(4)(C).

12 VII. SECOND CLAIM FOR RELIEF

13 24. Plaintiffs reallege paragraphs 1 through 23.

14 25. Section 1002(a) of OPA, 33 U.S.C. § 2702(a), provides in pertinent part, as
15 follows:

16 Notwithstanding any other provision or rule of law, and subject to the provisions
17 of this Act, each responsible party for a vessel or a facility from which oil is
18 discharged, or which poses the substantial threat of a discharge of oil, into or upon
19 the navigable waters or adjoining shorelines or the exclusive economic zone is
20 liable for the removal costs and damages specified in subsection (b) of this section
21 that result from such incident.

22 26. Section 1002(b)(2)(A) of OPA, 33 U.S.C. § 2702(b)(2)(A), provides in pertinent
23 part, as follows:

24 Damages for injury to, destruction of, loss of, or loss of use of, natural resources,
25 including the reasonable costs of assessing the damage, which shall be
26 recoverable by a United States trustee, a State trustee, an Indian Tribe trustee, or a
27 foreign trustee.

28 27. The plant owned or operated by Defendant is a facility within the meaning of
sections 1001(9) and 1002 of OPA, 33 U.S.C. §§ 2701(9) and 2702.

29 28. Defendant is a responsible party within the meaning of section 1001(32) of OPA,
30 33 U.S.C. § 2701(32).

29. The discharge of oil into the Hylebos Waterway or adjoining shorelines at the facility owned or operated by Defendant has resulted in injury to, destruction of, or loss of natural resources within the trusteeship of one or more of the Plaintiffs.

30. Defendant is liable to Plaintiffs for natural resource damages resulting from discharges of oil pursuant to section 1001 of OPA, 33 U.S.C. § 2701.

VIII. THIRD CLAIM FOR RELIEF

31. Plaintiffs reallege paragraphs 1 through 30.

32. Section 311(b)(3) of the CWA, 33 U.S.C. § 1321(b)(3), provides in pertinent part, as follows:

The discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone . . . or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States . . . in such quantities as may be harmful as determined by the President under paragraph (4) of this subsection, is prohibited

33. Section 311(f)(2) of the CWA, 33 U.S.C. § 1321(f)(2), provides in pertinent part, as follows:

Except where an owner or operator of an onshore facility can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United State Government, or (D) an act or omission of a third party without regard to whether an such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any such facility from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government

34. Section 311(f)(4) of the CWA, 33 U.S.C. § 1321(f)(4), provides in pertinent part, as follows:

The costs of removal of oil or a hazardous substance for which the owner or operator of a vessel or onshore or offshore facility is liable under subsection (f) of this section shall include any costs or expenses incurred by the Federal Government or any State government in the restoration or replacement of natural resources damaged or destroyed as a result of a discharge of oil or a hazardous substance in violation of subsection (b) of this section.

35. The facility owned or operated by Defendant is an onshore facility within the meaning of section 311(f)(1) of the CWA, 33 U.S.C. § 1321(f)(1).

1 36. There have been discharges of oil or hazardous substances in harmful quantities
2 into the Hylebos Waterway and adjoining shorelines from the facility owned or operated by
3 Defendant.

4 37. Discharges of oil or hazardous substances from the facility owned or operated by
5 Defendant into the Hylebos Waterway or adjoining shorelines have affected, damaged or
6 destroyed natural resources belonging to, appertaining to, or under the exclusive management
7 authority of the United States.

8 38. Defendant is liable to the United States and State of Washington for natural
9 resource damages resulting from discharges of oil or hazardous substances into the Hylebos
10 Waterway or adjoining shorelines pursuant to section 311(f) of the CWA, 33 U.S.C. § 1321(f).

11 IX. FOURTH CLAIM FOR RELIEF

12 39. Plaintiffs reallege paragraphs 1 through 38.

13 40. MTCA, Chapter 70.105D.040 RCW, provides in pertinent part as follows:

14 (1) Except as provided in subsection (3) of this section, the following persons are liable
15 with respect to a facility:

16 (a) The owner or operator of the facility;

17 (b) Any person who owned or operated the facility at the time of disposal or
release of the hazardous substances;

18 (c) Any person who owned or possessed a hazardous substance and who by
19 contract, agreement, or otherwise arranged for disposal or treatment of the hazardous
substance at the facility, or arranged with a transporter for transport for disposal or
20 treatment of the hazardous substances at the facility, or otherwise generated hazardous
wastes disposed of or treated at the facility;

21 (d) Any person (i) who accepts or accepted any hazardous substance for transport
22 to a disposal, treatment or other facility selected by such person, from which there is a
release or a threatened release for which remedial action is required, unless such facility,
at the time of disposal or treatment, could legally receive such substance; or (ii) who
23 accepts a hazardous substance for transport to such a facility and has reasonable grounds
to believe that such facility is not operated in accordance with chapter 70.105 RCW; and
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25 (e) Any person who both sells a hazardous substance and is responsible for written
instructions for its use if (i) the substance is used according to the instructions and (ii) the
26 use constitutes a release for which remedial action is required at the facility.

27 (2) Each person who is liable under this section is strictly liable, jointly and severally, for
28 . . . all natural resource damages resulting from the releases or threatened releases of
hazardous substances.

1 41. Materials disposed of and released in the Commencement Bay Environment at the
2 site owned or operated by Defendant include hazardous substances within the meaning of
3 Chapter 70.105D.020(6)(c) RCW.

4 42. The site owned or operated by Defendant is a facility within the meaning of
5 Chapter 70.105D.020(4) RCW.

6 43. The Commencement Bay Environment is a facility within the meaning of Chapter
7 70.105D.020(4) RCW.

8 44. Releases or threatened releases of hazardous substances have occurred in the
9 Commencement Bay Environment within the meaning of Chapter 70.105D.020 RCW and
10 Chapter 70.105D.040 RCW.

11 45. The natural resources that have been and continue to be injured, destroyed, or lost
12 by the release of hazardous substances at the facility owned or operated by Defendant include
13 fish, shellfish, invertebrates, birds, marine sediments, and other such natural resources.

14 46. The State of Washington has incurred and continues to incur response costs
15 related to the assessment of injury to natural resources caused by the releases of hazardous
16 substances at the facility owned or operated by Defendant.

17 47. Pursuant to Chapter 70.105D.040(2) RCW, Defendant is jointly and severally
18 liable to the State of Washington for all damages to natural resources in the Commencement Bay
19 Environment, resulting from the release of hazardous substances at or from Defendant's facility.

20 X. REQUEST FOR RELIEF

21 WHEREFORE, Plaintiffs request that this Court enter judgment against
22 Defendant:

23 (1) For damages for injury to natural resources resulting from the discharges or releases
24 of hazardous substances in the Hylebos Waterway and Commencement Bay Environment,
25 including the cost of assessing such damages; and
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1 (2) Awarding Plaintiffs such other and further relief as this Court may deem appropriate.

2 Dated: November __, 2006

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4
5 UNITED STATES OF AMERICA

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PUYALLUP TRIBE OF INDIANS

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